No. 95-5257

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ISMAEL ORNELAS-LEDESMA AND SAUL ORNELAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the court of appeals, accepting as not clearly erroneous the facts the district court found, was required to review de novo the district court's conclusion that those facts provided reasonable suspicion justifying an investigatory stop and probable cause to search.

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OPINIONS BELOW

The order of the court of appeals affirming petitioners' convictions (J.A. 91-93) is unreported, but the judgment is noted at 52 F.3d 328 (Table). The earlier opinion of the court of appeals vacating the convictions and remanding for further proceedings (J.A. 55-73) is reported at 16 F.3d 714. The recommendations of the magistrate judge (J.A. 7-27, 76-84) and the opinions of the district court (J.A. 28-36, 74-75, 85-90) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1995. The petition for a writ of certiorari was filed on

July 17, 1995, and was granted on November 6, 1995 (J.A. 94). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

After entering conditional guilty pleas in the United States District Court for the Eastern District of Wisconsin, petitioners were convicted of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner Ornelas-Ledesma was sentenced to 60 months' imprisonment and petitioner Ornelas was sentenced to 63 months' imprisonment, each term to be followed by four years' supervised release. J.A. 4-5, 45-46, 48-51. On petitioners' appeal from the denial of their motion to suppress cocaine found behind a side panel in their car, the court of appeals vacated the judgments of conviction and remanded for further proceedings. J.A. 55-73. On remand, the United States magistrate judge recommended that the motion to suppress be granted, J.A. 76-84, but the district court sustained the government's objection to the magistrate judge's recommendation and denied the suppression motion, J.A. 85-90. The court of appeals affirmed. J.A. 91-93.

1. The facts are undisputed.[1] On December 11, 1993, Detective Pautz of the Milwaukee County Sheriff's Office was making a routine survey of the motels along South 27th Street in Milwaukee, Wisconsin, looking for drug trafficking activity. In one of the motel parking lots he spotted a 1981 two-door Oldsmobile with a California license plate. Based on his training and experience in drug interdiction, Pautz knew that narcotics traffickers often use older two-door General Motors cars because it is easy to conceal drugs in them, and that California is a "source" State from which drugs are shipped to other States. J.A. 9, 56. Pautz radioed his dispatcher to find out to whom the car was registered. The dispatcher responded either that the registered owner of the car was Miguel Ledesma Ornelas or Miguel Ornelas Ledesma; Pautz was unsure whether the dispatcher indicated that the name "Ledesma" came before or after the name "Ornelas." J.A. 9-10, 56-57.

Believing that he had the name of the car's registered owner, Detective Pautz entered the motel and checked the registry, which showed that an Ismael (not Miguel) Ornelas and another man had registered at 4:00 a.m. without reservations. Pautz called for his partner, Detective Hurrle, to join him at the motel parking lot. After Hurrle arrived, the two officers asked the local office of the federal Drug Enforcement Agency

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[1] The facts in this statement are drawn from the factual findings of the magistrate judge, J.A. 9-13, 79, as adopted by the district court, J.A. 28, 86, and affirmed by the court of appeals, J.A. 56-59, 92.

(DEA) to run a check, through its Narcotic and Dangerous Drug Information System (NADDIS), on Miguel Ledesma Ornelas from San Jose and on Ismael Ornelas.[2] NADDIS reported two "hits," i.e., records of known or suspected criminal activity. One identified Miguel Ledesma Ornelas (also known as Miguel Lemus-Ledesma), a 48-year-old Hispanic male, five feet six inches tall and weighing 150 pounds, as a suspected heroin dealer from El Centro, California. The other identified Ismael Ornelas, Jr., of Tucson, Arizona, as a suspected 1,000-kilogram-per-month cocaine dealer. The officers did not attempt to obtain further descriptions of the two suspected dealers. They summoned the handler of the narcotics-detecting dog for the Drug Enforcement Unit, Detective Luedke. When Luedke arrived, Hurrle informed him of the information the officers had obtained, and Pautz left for another assignment. J.A. 10-11, 57-58.

As detectives Hurrle and Luedke observed from their cars in the motel parking lot, two men left the motel and entered the Oldsmobile. Detective Hurrle approached the car, identified himself as a police officer, asked whether he could speak with them, and inquired whether they had any illegal drugs or contraband. Both men denied possessing anything illegal. Hurrle then asked the men for identification. Saul Ornelas, the driver, produced a driver's license in that name. Ismael Ornelas-Ledesma, who was in the front passenger seat, produced a

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[2] NADDIS is a computerized compilation of DEA's information on known and suspected drug traffickers. J.A. 57.

California driver's license in the name of Ismael Ornelas with a Martinez, California, address. Hurrle asked them if he could search the car, and they consented to the search. J.A. 11-12, 58-59.

Detective Hurrle searched the trunk, and Detective Luedke (without the aid of the drug-sniffing dog) searched the interior of the car. During his inspection, Luedke noticed a loose right rear interior panel on the passenger side of the car. One of the screws used to fasten a vent cover to the panel was, according to Luedke, rusty, and he believed that the rust indicated that the screw had recently been removed.[3] Luedke removed the screw and dismantled the vent area, removed the loose panel, and uncovered a package containing two kilograms of cocaine. The officers arrested petitioners. J.A. 12-13, 59; Tr. 155-159.

2. Petitioners filed pre-trial motions to suppress the cocaine found in the car. The magistrate judge recommended that the motions be denied. J.A. 26. The magistrate judge first determined that the investigatory stop of petitioners was justified by reasonable suspicion that "criminal activity was afoot." J.A. 20. The magistrate judge relied on the officers' experience that cars like the 1981 Oldsmobile are often used for transporting drugs, and their knowledge that petitioners' car was registered in a "source" State for narcotics, that petitioners

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[3] The court of appeals stated that Luedke did not explain the basis for his inference, but that "maybe the idea is that the removal of the screw would have scraped off its chrome coating, which protected it from rusting." J.A. 59.

had checked into the motel at 4:00 a.m. without reservations, and that the car owner's "name came back on NADDIS as being a drug trafficker, and the name of Ismael Ornelas, Jr. came back on NADDIS as also being a drug trafficker." Ibid.

The magistrate judge next determined that petitioners had validly consented to the search of the car, but that the consent did not extend to the removal of the interior panel. J.A. 21. Because the magistrate judge's own examination of the screw revealed no rust, he did not credit Luedke's testimony that the rusty screw led him to believe that the panel had been removed to store drugs. J.A. 21-22.[4] The magistrate judge thus recommended that the district court hold that the search behind the panel was not supported by the requisite probable cause. J.A. 22. He nonetheless recommended denial of the suppression motions because, under the inevitable discovery exception to the exclusionary rule, the drug-sniffing dog would have detected the drugs. J.A. 22-23.

The district court accepted the magistrate judge's recommendation that the suppression motion be denied, but on a different theory. J.A. 28-35. The court agreed with the magistrate judge that the investigatory stop and consent search were valid, J.A. 28-29, but concluded that it was unnecessary to invoke the inevitable discovery doctrine because, in its view, the search behind the door panel was supported by probable cause,

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[4] The parties stipulated to the fact that the screw was not rusty. See J.A. 33.

J.A. 30-31. The district court stated that the magistrate judge's probable cause ruling "does not consider the totality of the circumstances leading up to the removal and search of the door panel." J.A. 33. In the district court's view, the model, age, and "source" State of origin of the car, and the fact that two men traveling together checked into the motel at 4:00 a.m. without reservations, formed a "drug courier profile," which, together with the two NADDIS hits and the loose interior car panel, amounted to probable cause to remove the panel and search for drugs. J.A. 33-34.

3. The court of appeals, following its holding in United States v. Spears, 965 F.2d 262 (7th Cir.), cert. denied, 113 S. Ct. 502 (1992), applied a clear-error standard of review to the district court's determinations of reasonable suspicion and probable cause. J.A. 65-66. Spears had noted (965 F.2d at 269) that, in Illinois v. Gates, 462 U.S. 213, 236, 238-239 (1983), this Court stated that courts should not conduct de novo review of the sufficiency of affidavits supporting the issuance of warrants, but instead should review such affidavits to determine only whether the issuing magistrate had a "substantial basis" for finding probable cause. Spears extended that form of deferential review (which it equated to review for clear error) to appellate review of a district court's finding of probable cause in a nonwarrant case. 965 F.2d at 269-270. The court in Spears recognized that probable cause is "a legal conclusion, dependent solely on a factual analysis: the facts are what the police knew

and did; the finding of probable cause is a conclusion that those facts meet the legal criteria for probable cause." Id. at 270. It nonetheless concluded that, "[b]ecause there is little to distinguish a magistrate's probable cause determination in a warrant case and a district judge's probable cause determination in a nonwarrant case, appellate review should be the same for both." Ibid. In either case, "[i]t is the front-line judicial officer * * * who conducts the initial inquiry," and "an appellate panel should not substitute its judgment in either case." Id. at 271.[5]

The court of appeals held that the district court did not err in this case by ruling that the stop was supported by reasonable suspicion, although it regarded the question as "close." J.A. 65.[6] Because the reliability of the information stored in NADDIS had not been established in this case, the court treated a NADDIS hit as no more reliable than a tip from an informant not known to be reliable. Accordingly, the court found the NADDIS hits to be insufficient to support a stop unless corroborated by other facts. J.A. 62. The court concluded, however, that the detectives had sufficient corroboration to

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[5] The Spears court observed that, "[b]ecause this decision changes the law of this circuit, we have circulated this opinion to all active judges * * *. A majority of the judges has voted not to rehear the case en banc." 965 F.2d at 269 n.2.

[6] Spears addressed only the standard of review of probable-cause determinations, but in this case the court of appeals applied the clear-error standard to the reasonable-suspicion determination as well, observing that "[t]here is no basis for distinguishing in this regard between probable cause and reasonable suspicion. They are adjacent points on a continuum." J.A. 65-66.

establish reasonable suspicion. J.A. 64. The corroborative facts included the make and age of the car, its "source" State origin, the 4:00 a.m. motel check-in without advance reservations, and the fact that the two NADDIS hits, although ultimately proving to have identified individuals other than petitioners, reasonably appeared to the officers at the time to be mutually reinforcing. J.A. 59-60. The court explained that both the names in NADDIS were "very similar" to the names on the motel registry and car registration, and that the ways in which they were not identical were readily explained: "Jr." could have been left off Ismael Ornelas' name in the motel registry, and Miguel Ornelas Ledesma's last names could have been reversed in entering them in the computer. J.A. 63. In the court of appeals' view, "the fact that both the registered owner of the car and the name on the motel registry corresponded more or less to names of suspected drug dealers in the NADDIS database was impressive." Id. at 64.

The court of appeals rejected the district court's probable cause analysis, however, concluding that the denial of the suppression motion could not be upheld "on the basis of the record compiled in the district court." J.A. 66. In the court of appeals' view, the key fact informing the district court's probable cause ruling was Detective Luedke's testimony that the car's right rear interior panel was loose, ibid., but the magistrate judge ruled on alternative grounds "[w]ithout discussing the bearing of Luedke's testimony about the loose

panel on the issue of probable cause," J.A. 67.[7] The court of appeals accordingly vacated the convictions and remanded the case to the district court for a determination of the credibility of Luedke's testimony about the loose panel. If the district court were to credit that testimony, the court of appeals instructed, it must determine whether "the loose panel, in conjunction with the NADDIS tips as corroborated by the circumstances that first aroused Detective Pautz's suspicions, adequately established probable cause to believe that drugs were concealed behind the panel." J.A. 72-73.

4. On remand, the district court referred the case to the magistrate judge for an initial determination. J.A. 74-75. Before the magistrate judge, the parties stipulated to resolution of the matter on the existing record. J.A. 82. The magistrate judge expressly accepted the credibility of Detective Luedke's testimony that the car's interior panel was loose, but concluded that "the loose panel alone, given the age of the Oldsmobile, is not probative evidence of the fact it necessarily had been recently removed." J.A. 79. The NADDIS hits and other factors alone were not, in the magistrate judge's view, sufficient to establish probable cause to remove the panel. J.A. 79-83. He accordingly recommended that the suppression motion be granted.

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[7] The court held that the government had waived on appeal the claim, accepted by the magistrate judge, that the presence at the scene of the drug-sniffing dog ensured that the drugs inevitably would have been discovered. J.A. 72. In any event, the court of appeals believed the inevitable-discovery claim could not be supported in the absence of evidence regarding the dog's capabilities and intended use. J.A. 71-72.

J.A. 83, 84.

The district court accepted the finding that Luedke's testimony was credible. J.A. 86. It rejected, however, the magistrate judge's recommended disposition and instead denied the suppression motion. While stating that "the issue is a close one," the district court again reached the conclusion that the facts established probable cause. J.A. 85-90. The court commented that, "[v]iewed individually," the conformity with the drug courier profile, the NADDIS hits, or the loose panel "may be unremarkable," but "[t]hey become more meaningful when, in a specific case, they converge and form around two specific individuals." J.A. 87. The district court viewed the loose panel as "the final fact in a string of unbroken facts which establishes the probable cause equation." J.A. 89.

5. On appeal after remand, the court of appeals upheld under the "clear error" standard the district court's determination that the removal of the door panel was supported by probable cause. J.A. 91-93. The court stated that the district court's opinion "adequately reviews the circumstances on which the decision to search the car was based and explains why taken as a totality they gave the officers probable cause to conduct the search." J.A. 92.

SUMMARY OF ARGUMENT

A court of appeals should apply a de novo standard of review to a trial court's holding of whether the facts known to law enforcement officers add up to the reasonable suspicion or

probable cause required to justify the search or seizure in question.

Probable cause and reasonable suspicion determinations turn on an evaluation of whether the totality of the circumstances give rise to an objectively reasonable basis for conducting a search or seizure. Each inquiry has two components. First, the historical facts known to the officers must be established. Second, once those facts are established, a judgment must be made whether it was objectively reasonable under the known circumstances to draw the conclusion that criminal conduct likely would be brought to light by conducting an investigatory stop or search. The second step in the analysis goes beyond the realm of finding facts, and requires a legal judgment about the constitutionality of the search or seizure.

Under conventional standards for determining the scope of appellate review, the trial court's determination of reasonable suspicion or probable cause to support a warrantless search is subject to de novo review. While factual findings are reviewed only for clear error, courts of appeals customarily conduct plenary review of the governing legal standards. Courts of appeals also conduct plenary review of so-called mixed questions of law and fact when that process is necessary to develop the meaning of a legal standard and to ensure its consistent application. Those considerations strongly support de novo review in the present context. The analysis here parallels that conducted by the Court in Thompson v. Keohane, 116 S. Ct. 457,

465, 467 (1995), in which the Court held that, in federal habeas proceedings, "independent," rather than deferential, review applies to determinations of whether a suspect was in custody for purposes of Miranda warnings. De novo review also accords with this Court's cases, which have in a wide variety of settings subjected probable cause and reasonable suspicion determinations to independent, plenary review.

The advantages that normally justify de novo appellate review are fully applicable here. First, the exposition of the Fourth Amendment standard of reasonableness depends on the process of case-by-case elaboration in the appellate courts. Second, the development of the law at the appellate level gives guidance to law enforcement officers and promotes consistent outcomes in the trial courts. Third, the considerations favoring de novo review have special force where, as here, a constitutional right is concerned.

Nothing in this Court's decisions suggests that deference is owed to a trial judge's finding that a warrantless search was or was not justified by the requisite level of suspicion. In Illinois v. Gates, 462 U.S. 213 (1983), this Court held that after-the-fact review of a neutral magistrate's determination to issue a search warrant should be conducted deferentially, and that the warrant should be upheld "so long as the magistrate had a 'substantial basis for . . . conclud[ing]' that a search would uncover evidence of wrongdoing." Id. at 236. That conclusion reflected the "preference to be accorded to warrants" under the

Fourth Amendment, id. at 237 n.10; it has no application to appellate review of a district court's determination of the validity of a warrantless search or seizure. Similarly, this Court's decisions approving deferential review of legal issues that involve supervision of litigation, events occurring before the trial court, or mixed questions of fact and law such as negligence that are traditionally administered by juries, are inapplicable to the constitutional conclusion, rendered by the courts, of whether a warrantless search was justified. That conclusion requires a balance of law enforcement needs against privacy interests, and it calls for plenary appellate review.

The court of appeals in this case did not apply a de novo standard, but instead approved the stop and search in question based on deferential, clear-error review of the district court's conclusions. In our view, both the stop and search, if reviewed under a de novo standard, should be upheld as supported by the requisite levels of suspicion. Because the court of appeals has not yet applied the de novo standard to the facts found here, this case should be remanded to that court for application of the proper standard of review.

ARGUMENT

IN REVIEWING A DISTRICT COURT'S DETERMINATION OF WHETHER REASONABLE SUSPICION OR PROBABLE CAUSE EXISTED FOR A WARRANTLESS SEARCH OR SEIZURE, A COURT OF APPEALS SHOULD APPLY A DE NOVO STANDARD

A. Reasonable Suspicion And Probable Cause Are Objective Legal Conclusions Based On The Totality Of The Circumstances

The investigative stop of petitioners was permissible under the Fourth Amendment if supported by reasonable suspicion, Terry v. Ohio, 392 U.S. 1 (1968), and the warrantless search of their car was valid if based on probable cause, California v. Acevedo, 500 U.S. 565, 569-570 (1991); Carroll v. United States, 267 U.S. 132, 158-159 (1925). The standards for both reasonable suspicion and probable cause depend on a determination, given the totality of the circumstances, of whether an objectively reasonable law enforcement officer would have justification for the stop or search at issue. United States v. Cortez, 449 U.S. 411, 418 (1981) (reasonable suspicion); Illinois v. Gates, 462 U.S. 213, 230-231 (1983) (probable cause). Each inquiry requires a two-step analysis: first, an identification of all the pertinent facts known to the law enforcement officers conducting the stop or search, and, second, an evaluation of whether, as a matter of objective reasonableness, that information adds up to reasonable suspicion or probable cause to believe that the stop or search will uncover contraband or evidence of a crime.

It is well established that the second step of determining probable cause requires more than just a factual analysis; it requires, instead, an appraisal of the totality of the

circumstances under an objective, legal standard. Gates, 462 U.S. at 230, 238. Probable cause exists where "the facts and circumstances within [the law enforcement officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" the search will yield evidence of a crime. Carroll, 267 U.S. at 162. The probabilities with which the concept is concerned "are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Brinegar v. United States, 338 U.S. 160, 175 (1949). The substantive standard reflects an appropriate deference to law enforcement officers: the facts must be evaluated not as an average citizen would understand them, but from the perspective of an officer "versed in the field of law enforcement." Gates, 462 U.S. at 232, quoting Cortez, 449 U.S. at 418.

The reasonable suspicion standard closely parallels the objective framework for analyzing probable cause, but because an investigative stop is less intrusive than a search, the suggestion that crime, contraband, or evidence of crime may be present need not be as strong. United States v. Brignoni-Ponce, 422 U.S. 873, 880 (1975); Alabama v. White, 496 U.S. 325, 330 (1990). Reasonable suspicion to stop exists when, based on the totality of the circumstances, "the detaining officers * * * have a particularized and objective basis for suspecting the particular person stopped of criminal activity." Cortez, 449

U.S. at 417-418. Like probable cause, reasonable suspicion is not an historical fact; it is a legal conclusion, measured by an objective constitutional standard. Terry, 392 U.S. at 21-22; Cortez, 449 U.S. at 417-418; Brown v. Texas, 443 U.S. 47, 52 n.2 (1979).

B. The Ultimate Conclusion In Nonwarrant Cases Of Whether Reasonable Suspicion Or Probable Cause Exists Is Subject To De Novo Appellate Review

1. The standards of appellate review generally applicable to questions of fact and questions of law are well established. Appellate courts "accept[] findings of fact that are not 'clearly erroneous' but decid[e] questions of law de novo." First Options of Chicago, Inc. v. Kaplan, 115 S. Ct. 1920, 1926 (1995); see Pierce v. Underwood, 487 U.S. 552, 558 (1988). Appellate deference to a trial court's findings of fact is mandated in the civil context by Federal Rule of Civil Procedure 52(a), which provides that a trial court's findings of fact "shall not be set aside unless clearly erroneous." In the context of federal habeas corpus review of state court judgments, Congress has conferred a presumption of correctness, subject to enumerated exceptions, on state courts' findings of fact. 28 U.S.C. 2254(d). There is no similar express rule governing direct appeals in criminal cases, but this Court applies the clearly erroneous standard to findings of fact in the criminal setting as well. Maine v. Taylor, 477 U.S. 131, 145 (1986); see also Hernandez v. New York, 500 U.S. 352, 365-366 (1991) (plurality opinion). In contrast, appellate courts are generally free to

conduct a de novo review of legal conclusions, and it is their principal function to do so. Salve Regina College v. Russell, 499 U.S. 225, 231-232 (1991). Under a de novo standard, appellate courts must "make an independent determination" of the legal conclusions of the lower courts. United States v. First City National Bank, 386 U.S. 361, 368 (1967); Salve Regina College, 499 U.S. at 231.

The traditional standards of review of fact and law serve systemic goals of "doctrinal coherence and economy of judicial administration." Salve Regina College, 499 U.S. at 231. The application of the clearly erroneous standard to questions of fact recognizes that trial judges are "usually in a superior position to appraise and weigh the evidence." Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969); see also Thompson v. Keohane, 116 S. Ct. 457, 465 (1995); Miller v. Fenton, 474 U.S. 104, 114 (1985). The district courts have "unchallenged superiority" in factfinding, Salve Regina College, 499 U.S. at 233, because their energy and resources are primarily devoted to the time-consuming tasks associated with hearing evidence and finding facts. They seldom, however, have the opportunity for extensive reflection on legal issues. Courts of appeals, in contrast, are institutionally structured to focus principally on deciding legal issues. They hear arguments but do not face the burdens of taking evidence, and they enjoy the benefits of a "collaborative juridical process that promotes decisional accuracy." Id. at 232. In addition, the coherent

development of a body of law requires appellate courts to establish controlling principles and to demonstrate the meaning of those principles through their consistent application across a range of varying factual contexts. Thompson, 116 S. Ct. at 467.

There is no dispute that the underlying factual circumstances that bear on reasonable suspicion and probable cause determinations are issues of fact, reviewable under the deferential clearly erroneous standard. This Court has defined factual findings as "basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators,'" Thompson, 116 S. Ct. at 464, quoting Townsend v. Sain, 372 U.S. 293, 309 n.6 (1963). Findings regarding what information was known to officers conducting a stop or a warrantless search, and when and how they learned it, are factual in that sense, and thus, under the clear-error standard, may not be reversed unless "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); see also Anderson v. City of Bessemer City, 470 U.S. 564, 573-574 (1985) (discussing when error is "clear" and giving trial court choice between two permissible views of the evidence).

The ultimate determination of probable cause or reasonable suspicion, however, is not a factual matter. Courts must decide as a matter of law whether the facts supply the requisite quantum of suspicion to render a search or seizure "reasonable" under the

Fourth Amendment. Probable cause and reasonable suspicion are judged under an objective standard, measured by what a reasonable person would conclude; those determinations are not controlled by the subjective state of mind of the officers conducting the search. See Terry, 392 U.S. at 21-22; Gates, 462 U.S. at 231; Florida v. Royer, 460 U.S. 491, 507 (1983) (plurality opinion). Here, as elsewhere, the reasonable person is a "legal construct," calling for a judgment that goes far beyond determination of "what happened."[8] In the Fourth Amendment setting, that construct requires a judgment about the degree of information needed to justify the intrusion in question. The courts must give content to the general concepts of reasonable suspicion and probable cause in a manner that "safeguard[s] citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime," while "giv[ing] fair leeway to enforcing the law in the community's protection." Brinegar, 338 U.S. at 176. In addition, the conclusion whether probable cause or reasonable suspicion existed in a particular case not only provides the rule of decision for the case at hand, but also establishes guidance for public officials and courts confronted with similar circumstances in the future.

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[8] Antilles S.S. Co. v. Members of Am. Hull Ins. Syndicate, 733 F.2d 195, 204 (2d Cir. 1984) (Newman, J., concurring) ("[I]f the law's hypothetical reasonable person were to appear in the courtroom as a deus ex machina and respond to an inquiry as to what he or she thought the terms [of the contract] meant, the answer would be a matter of fact in the traditional sense-- an observable, recordable historical event. But the law's reasonable person has not yet appeared on the witness stand of any courtroom. That person remains a legal construct.").

Probable cause and reasonable suspicion determinations might be characterized as "mixed question[s] of law and fact." Thompson, 116 S. Ct. at 465.[9] As between a legal and a mixed question, however, the precise characterization is not crucial, because mixed questions, too, are typically subject to de novo review. A standard of "independent review" is generally applied to "mixed question[s] of law and fact," so that the appellate courts may elaborate the meaning of precedent and explicate underlying "legal values" through case-by-case review. Id. at 464 n.9, 465, 467; see also Miller, 474 U.S. at 109; Strickland v. Washington, 466 U.S. 668, 698 (1984); Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 501 (1984); Cuyler v. Sullivan, 446 U.S. 335, 342 (1980); Neil v. Biggers, 409 U.S. 188, 193 n.3 (1972).

2. This Court's recent decision in Thompson, involving a mixed question of law and fact closely analogous to the Fourth Amendment issues here, reinforces the conclusion that the reasonable suspicion and probable cause determinations should be reviewed de novo. To determine whether a suspect is "in custody" for Miranda purposes, a court must, applying "the totality of the circumstances," determine "how a reasonable man in the suspect's position would have understood his situation." Berkemer v.

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[9] A mixed question is one "in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982).

McCarty, 468 U.S. 420, 442 (1984). Citing the applicable "reasonable man" standard, the respondents in Thompson argued that the "in custody" inquiry was factual. The Court rejected that argument, stressing the distinction between the first step, "identification of the 'totality of the circumstances,'" and the second, evaluation of whether those circumstances, "if encountered by a 'reasonable person,' would * * * add up to custody as defined in Miranda." 116 S. Ct. at 466. The Court accordingly concluded that the presumption of correctness that attaches to state court factual determinations under 28 U.S.C. 2254(d) does not apply to Miranda custody determinations. See also Miller, 474 U.S. at 112 ("[T]he ultimate question whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution is a matter for independent federal determination.").

Reasonable suspicion and probable cause determinations entail the same two-step approach of viewing the "totality of the circumstances" through the eyes of a "reasonable person," and there is no basis for treating the ultimate constitutional question of objective reasonableness differently here from the Court's treatment of the Miranda custody question in Thompson. In sum, whether the second step of the probable cause inquiry is viewed as a legal or a mixed question, it involves a determination, unanswerable by simple recourse to the facts, concerning whether the known information justified a reasonable

conclusion that a search was sufficiently likely to turn up evidence of a crime. As such, it should be reviewed de novo.

3. This Court has expressly indicated that probable cause determinations regarding warrantless searches or arrests are to be accorded independent appellate review. In Ker v. California, 374 U.S. 23 (1963), the petitioners challenged, for lack of probable cause, the legality of a warrantless search made incident to their arrest. Before reviewing the evidence bearing on the existence of probable cause, the Court addressed the question of the applicable standard of review, commenting that, "[w]hile this Court does not sit as in nisi prius to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental -- i.e., constitutional -- criteria established by this Court have been respected." Id. at 34. Conducting its own de novo review, the Court then proceeded "to examine the entire record including the findings of California's courts to determine whether the evidence seized from petitioners was constitutionally admissible under the circumstances of th[e] case." Ibid.

In another warrantless search case, Beck v. Ohio, 379 U.S. 89 (1964), the Court relied on Ker for the same principle. The Court reiterated that it had a responsibility to make an "independent examination" of the record to resolve the ultimate

question of whether the constitutional standard of probable cause was satisfied. Id. at 92, quoting Ker, 374 U.S. at 34.[10] See also Elkins v. United States, 364 U.S. 206, 223-224 (1960) (in discarding the "silver platter" doctrine that allowed use in federal trials of evidence seized by state agents without probable cause, the Court stated that, "[i]n determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out").

In many cases, the Court has, without expressly articulating the applicable standard of review, conducted a careful, detailed examination of the established facts to determine whether they amounted to reasonable suspicion or probable cause. For example, in Carroll v. United States, 267 U.S. 132 (1925), the Court approached the determination of probable cause as if it were deciding the issue afresh, posing for itself the question "was there probable cause?" and examining the facts in detail, id. at 159-161, rather than simply asking whether the district court's determination was clearly erroneous. Similarly, in Brinegar v. United States, 338 U.S. 160, 165-171 (1949), the Court observed

[10] Both Ker and Beck involved direct review of probable cause rulings made by state courts instead of federal district courts. But the Court's requirement in those cases of independent appellate review is equally applicable to review of federal court determinations. As the Court stated in Bose Corp., 466 U.S. at 499, it would "pervert the concept of federalism for this Court to lay claim to a broader power of review over state-court judgments than it exercises in reviewing the judgments of [the lower] federal courts." See also Hernandez, 500 U.S. at 369 (plurality opinion).

that the facts were "substantially undisputed," id. at 162, and itself addressed "[t]he crucial question * * * whether there was probable cause for Brinegar's arrest," id. at 164. The district court had held that the officers lacked probable cause when they began to chase petitioner's car, and the court of appeals affirmed.[11] This Court, however, made its own detailed analysis of the facts and arrived at the opposite conclusion. The Court viewed the case as "indistinguishable" from Carroll, and held that it "necessarily follows" that the lower court's decision must be reversed if Carroll "is to continue in force." Id. at 171. The Court expressly rejected the practical results that clear-error review would tolerate: "In the absence of any significant difference in the facts, it cannot be said that the Fourth Amendment's incidence turns on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause." Ibid.[12]

Cases involving reasonable suspicion also reflect a long-established mode of review that can only be described as de novo. In Terry v. Ohio, 392 U.S. 1 (1968), this Court itself

[11] The lower courts had, however, rejected the suppression motion on the alternative grounds that petitioner's admission after his car was stopped provided probable cause for the search. 338 U.S. at 163.

[12] Probable cause determinations are also reviewed de novo in civil suits to recover damages for warrantless searches allegedly conducted without probable cause. In determining whether a government official is entitled to qualified immunity, reviewing courts determine as a matter of law whether, given the established facts, a reasonable officer could have believed there was probable cause to search. Anderson v. Creighton, 483 U.S. 635, 641 (1987).

"examine[d] the conduct of Officer McFadden in this case to determine whether his search and seizure of petitioner were reasonable." Id. at 27. In doing so, the Court did not defer to the trial court's determination, see id. at 8, but instead drew its own independent conclusion, stating: "We think on the facts and circumstances Officer McFadden detailed before the trial judge a reasonably prudent man would have been warranted in believing petitioner was armed and thus presented a threat to the officer's safety while he was investigating his suspicious behavior." Id. at 28.

Similarly, in United States v. Cortez, 449 U.S. 411, 418-421 (1981), this Court itself reviewed the facts in detail and arrived at an independent conclusion regarding the presence of reasonable suspicion. The Court posed the question as "whether, based upon the whole picture, * * * experienced Border Patrol officers[] could reasonably surmise that the particular vehicle they stopped was engaged in criminal activity," and determined that, "[o]n this record, they could so conclude." Id. at 421-422. In United States v. Sokolow, 490 U.S. 1 (1989), the Court emphasized its own role in reviewing the facts: "In evaluating the validity of a stop such as this, we must consider 'the totality of the circumstances -- the whole picture.'" Id. at 8, quoting Cortez, 449 U.S. at 417 (emphasis added). And in Alabama v. White, 496 U.S. 325 (1990), the Court again arrived at an independent conclusion based on its analysis of the established facts, stating that, "[c]ontrary to the court below, we conclude

that when the officers stopped respondent, the anonymous tip had been sufficiently corroborated to furnish reasonable suspicion that respondent was engaged in criminal activity." Id. at 331-332. Again, the Court made no determination whether the lower court had made any clear errors. In none of these probable cause or reasonable suspicion cases did the Court suggest a need for deference to the district court, or imply that anything other than an independent determination of the ultimate issue was appropriate on appellate review.

C. The Precedential Importance Of Reasonable Suspicion And Probable Cause Conclusions, And The Need For Consistent Standards To Guide Official Conduct, Support A De Novo Standard Of Review

This Court has noted "the practical truth that the decision to label an issue a 'question of law,' a 'question of fact,' or a 'mixed question of law and fact' is sometimes as much a matter of allocation as it is of analysis." Miller, 474 U.S. at 113-114, citing Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229, 237 (1985). The classification of an issue as factual or legal may "turn[] on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." 474 U.S. at 114. See also Thompson, 116 S. Ct. at 465 (referring to "practical considerations that have prompted the Court to type questions * * * as 'factual issue[s]'"); First Options of Chicago, 115 S. Ct. at 1926 (referring to "respective institutional advantages" that affect "the reviewing attitude that a court of appeals takes toward a district court decision");

Pierce, 487 U.S. at 559-560; Bose Corp., 466 U.S. at 501-502 (identifying factors relevant to drawing the distinction between law and fact).

Those institutional considerations favor de novo review here. First, de novo review is appropriate because of the importance of the appellate court's "function as an expositor of law" regarding reasonable suspicion and probable cause. Miller, 474 U.S. at 114. The necessarily general nature of the reasonable suspicion and probable cause standards means that defining what conduct falls within constitutional bounds remains a task to be carried out through individual decisions. The Fourth Amendment reasonableness standards are not "susceptible of Procrustean application." Ker, 374 U.S. at 33. Rather, as the Court stated in Terry, 392 U.S. at 29, the limitations imposed by the Fourth Amendment "will have to be developed in the concrete factual circumstances of individual cases."

This Court has recognized that where, as here, "the content of the rule is not revealed simply by its literal text, but rather is given meaning through the evolutionary process of common-law adjudication," the standard should be treated as one of law subject to de novo appellate review. Bose Corp., 466 U.S. at 502; see Miller, 474 U.S. at 114 (where the "relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its

primary function as an expositor of law"); see also United States v. McConney, 728 F.2d 1195, 1200 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984); Monaghan, supra, 85 Colum. L. Rev. at 229, 273-276. Given a standard of objective reasonableness, the purely legal function of saying "what the law is" can be accomplished only by applying the basic standard to a series of closely related situations and thereby elaborating that standard. The exercise of decisional power in individual cases is, in circumstances such as these, "the process through which the rule itself evolves and its integrity is maintained." Bose Corp., 466 U.S. at 503.

A second, and closely related, functional principle that favors de novo review in this context is the need to give guidance to law enforcement officers to enable them to apply the constitutional standards consistently across the wide range of individual cases. The several decisions of this Court, and the body of case law developed by the federal courts of appeals, are the central means of spelling out the requirements of Fourth Amendment, providing guidance for law enforcement personnel, and reconciling conflicting trial court approaches. "[T]he protection of the Fourth and Fourteenth Amendments can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." New York v. Belton, 453 U.S. 454, 458 (1981) (internal quotation marks

omitted). As this Court recently confirmed in Thompson, "the law declaration aspect of independent review potentially may guide police, unify precedent, and stabilize the law," and those effects "serve legitimate law enforcement interests." 116 S. Ct. at 467.

This Court's decisions illustrate how case-by-case review of reasonable suspicion and probable cause determinations refine those standards and give rise to principles of general application to subcategories of Fourth Amendment cases. For example, the Court has offered guidance regarding the permissible weight to give certain recurring types of potentially suspicious activity, such as mere association with a known offender, United States v. Di Re, 332 U.S. 581, 593 (1948), flight upon the approach of police officers, Sibron v. New York, 392 U.S. 40, 66 (1968), and presence in neighborhood known to be frequented by drug users, Brown v. Texas, 443 U.S. 47, 52 (1979); see generally 2 W. LaFave, Search and Seizure § 3.6, at 29-74 (2d ed. 1987). Standards have also emerged regarding the permissible scope of a search of an automobile. See, e.g., California v. Acevedo, 500 U.S. 565 (1991) (probable cause to search a container authorizes search even in the absence of probable cause to search automobile in which container is found); United States v. Ross, 456 U.S. 798 (1982) (probable cause to search a vehicle authorizes search of containers and packages therein); see generally 3 W. LaFave, supra, §§ 7.1-7.5, at 1-145. And courts have dealt with such issues as the relevance of an offender "profile" to the issue of

reasonable suspicion. United States v. Sokolow, 490 U.S. at 10. It is through the development of such subsidiary standards that the general Fourth Amendment reasonableness standards gain specific content, and are subject to consistent administration by lower courts and law enforcement personnel.

Third, the considerations favoring de novo review carry special weight where a constitutional right is concerned. As the Court stated in the First Amendment context in Bose Corp., "the constitutional values protected by the rule make it imperative that judges -- and in some cases judges of this Court -- make sure that it is correctly applied." 466 U.S. at 502. Indeed, the Court has referred to independent review as a "duty of constitutional adjudication." Haynes v. Washington, 373 U.S. 503, 515 (1963). The Constitution has the same meaning in the hands of different law enforcement personnel and different district courts. "[D]eferential appellate review," however, would "invite[] divergent development of * * * law," Salve Regina College, 499 U.S. at 234, and disparate application of constitutional principles.

D. Neither Illinois v. Gates Nor Other Decisions Of This Court Support A Deferential Standard Of Review For District Court Determinations Of The Validity Of Warrantless Searches And Seizures

1. In adopting the clear-error standard of review for district court determinations of whether a warrantless search was supported by probable cause, the Seventh Circuit relied on Illinois v. Gates, supra. United States v. Spears, 965 F.2d 262, 269-272 (7th Cir.), cert. denied, 113 S. Ct. 502 (1992); J.A. 65-

66, 92 (citing Spears). In Gates, the Court reaffirmed the "traditional standard" of deferential review of a magistrate's determination that an affidavit was sufficient to establish probable cause for the issuance of a warrant. 462 U.S. at 236. Gates clarified that under that approach the affidavit is reviewed only to ensure that the magistrate had a "substantial basis" for issuing the warrant. Id. at 238-329. Because the probable cause standard is the same in both warrant and nonwarrant cases, the Seventh Circuit concluded that "[i]t would be anomalous to require a more searching review of a district judge's probable cause determination" in nonwarrant cases than of a magistrate's decision to issue a warrant. Spears, 965 F.2d at 270. The court of appeals thus held that a "clearly erroneous" standard should be applied in both contexts. Ibid.

The Seventh Circuit's reliance on Gates is misplaced. The "substantial basis" test of Gates reflected "the Fourth Amendment's strong preference for searches conducted pursuant to a warrant." 462 U.S. at 236. The Court reasoned that, "[i]f the affidavits submitted by police officers are subjected to the type of scrutiny some courts have deemed appropriate, police might well resort to warrantless searches, with the hope of relying on consent or some other exception to the Warrant Clause that might develop at the time of the search." Ibid. The Court added that "the possession of a warrant by officers conducting an arrest or search greatly reduces the perception of unlawful or intrusive police conduct." Ibid. For those reasons, the Court indicated

that a reviewing court's duty is "simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed." Id. at 238-239.

Gates's description of the "preference" for warrants, and the deferential review of magistrate determinations, is grounded in substantive Fourth Amendment principles long recognized by this Court. See United States v. Ventresca, 380 U.S. 102, 106, 109 (1965) (because "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall," the resolution of such a case "should be largely determined by the preference to be accorded to warrants"); United States v. Watson, 423 U.S. 411, 423 (1976) (law enforcement officers' "judgments about probable cause may be more readily accepted where backed by a warrant issued by a magistrate"); United States v. Leon, 468 U.S. 897, 914 (1984) ("[W]e have thus concluded that the preference for warrants is most appropriately effectuated by according 'great deference' to a magistrate's determination."). The reasoning of Gates, however, is not applicable to the allocation of functions between a district court and court of appeals in the review of warrantless searches and seizures. There is no reason grounded in Fourth Amendment doctrine to give leeway on appeal to a district court's after-the-fact conclusion that probable cause existed for a warrantless search, with the resulting potential for restriction of an individual's constitutional rights. Nor is there reason for appellate deference to a trial court's after-the-fact conclusion

that probable cause was lacking, with the resulting potential for injury to law enforcement interests and society's stake in the availability of lawfully obtained evidence in a criminal prosecution.[13] Fourth Amendment policy supports giving appropriate deference to the magistrate's determination to encourage the use of warrants. It does not, however, favor district court determinations over those of appellate courts on the ultimate determination of the constitutionality of a warrantless search or seizure. In sum, while there is a sound doctrinal basis for the standard adopted in Gates, no corresponding principle supports appellate deference to a trial court's decision upholding or invalidating a warrantless search or seizure.[14]

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[13] Under 18 U.S.C. 3731, the government may appeal "from a decision or an order of a district court[] suppressing or excluding evidence * * *." See United States v. Ceccolini, 435 U.S. 268, 271 n.1 (1978); 4 W. LaFave, supra, § 11.7(b), at 509-512.

[14] The Court in Gates did state, in passing, that "[t]here are so many variables in the probable-cause equation that one determination will seldom be a useful 'precedent' for another." 462 U.S. at 238 n.11. That statement was not a holding of Gates, nor was it addressed to what standard of review appellate courts should apply to district court determinations of probable cause in nonwarrant cases (an issue that was not presented in Gates). Rather, it was made in the context of explaining the Court's disinclination to conduct a retrospective evaluation of the sufficiency of the affidavit presented to the magistrate in Spinelli v. United States, 393 U.S. 410 (1969), a case that Gates overruled. See 462 U.S. at 238 (overruling "'two-pronged test' established by our decisions in Aguilar [v. Texas, 378 U.S. 108 (1964)] and Spinelli"). As discussed above, the Court's determinations of probable cause and reasonable suspicion issues have provided guidance to lower courts and law enforcement officers, and have harmonized results reached in different cases on similar facts. Gates cast no doubt on the line of cases in this Court (see pages 22-27, supra) that had applied independent, rather than deferential, review to lower court determinations of the

2. Other cases in which this Court has accorded deferential, clear-error review to questions extending beyond the historical facts are also inapplicable in this setting. Those cases fall into three main categories: those dealing with supervision of litigation on factbound issues, those that are heavily dependent on credibility determinations relating to an individual's subjective state of mind, and those involving mixed questions of law and fact that are traditionally decided by juries. None of those circumstances is present here.

In Cooter & Gell v. Hartmax Corp., 496 U.S. 384, 399 (1990), the Court acknowledged that, in reviewing a district court's decision imposing sanctions under Federal Rule of Civil Procedure 11, "[l]egal issues are raised in considering whether a pleading is 'warranted by existing law or a good faith argument' for changing the law and whether the attorney's conduct violated Rule 11." The Court nonetheless concluded that deferential review of Rule 11 decisions is appropriate. Similarly, in Pierce v. Underwood, 487 U.S. 552, 557-563 (1988), the Court held that an abuse-of-discretion standard applies to all aspects of review of district courts' attorneys' fees determinations under the Equal Access to Justice Act, even though the question whether the government's litigating position was "substantially justified" has legal elements. Id. at 560.

The Court in both cases held that those fact-bound issues involving the supervision of litigation before the district

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validity of warrantless searches and seizures.

courts were ill-suited to de novo appellate review. As the Pierce Court explained, "[b]y reason of settlement conferences and other pretrial activities, the district court may have insights not conveyed by the record, into such matters as whether particular evidence was worthy of being relied upon, or whether critical facts could easily have been verified by the Government." 487 U.S. at 560; see Cooter & Gell, 496 U.S. at 403-404. An appellate court could not easily familiarize itself with litigation events not appearing in the record, nor would the effort be justified in view of the limited precedential value of the result: the questions in these cases are "multifarious and novel," and "little susceptible, for the time being at least, of useful generalization." Pierce, 487 U.S. at 562; Cooter & Gell, 496 U.S. at 404.

The litigation-supervision rationale is inapplicable here. Probable cause and reasonable suspicion are not matters relating to the proper conduct of litigation before the district courts, but are matters of constitutional privacy rights and effective law enforcement; as discussed above, the utility of the development of constitutional precedent in this area is substantial.

The second line of cases in which this Court has applied a deferential standard of review to nominally legal questions "extending beyond the determination of 'what happened'" includes such issues as "competency to stand trial (e.g., Maggio v. Fulford, 462 U.S. 111, 117 (1983) (per curiam)); and juror

impartiality (e.g., [Wainwright v.] Witt, 469 U.S. [412,] 429 [(1985)]; Patton v. Yount, 467 U.S. 1025, 1036 (1984); Rushen v. Spain, 464 U.S. 114, 120 (1983))." Thompson, 116 S. Ct. at 464 (parallel citations omitted). The Court in Thompson described those determinations as essentially factual, and thus entitled to a presumption of correctness for purposes of Section 2254(d), because they deal with largely subjective standards, whose proper resolution "depends heavily" on "credibility findings whose basis cannot be easily discerned from an appellate record." 116 S. Ct. at 465. Because "the critical events," Miller, 474 U.S. at 117, surrounding the determination of juror impartiality and defendant competency -- e.g., juror voir dire and the court's first-hand observation of the defendant in a competency proceeding -- take place "in open court," Thompson, 116 S. Ct. at 466, quoting Miller, 474 U.S. at 117, it is appropriate to accord the judgment of the trial court, as "jurist-observer," presumptive weight, Thompson, 116 S. Ct. at 465.

Probable cause and reasonable suspicion determinations, in contrast to competency and juror bias, involve application of an objective standard to out-of-court events and information known to officers at an earlier time. A trial court has no "first-person vantage" on those events, Thompson, 116 S. Ct. at 466, and its "superior capacity to resolve credibility issues is not dispositive," id. at 465. Like the Miranda custody decision in Thompson, the Fourth Amendment reasonableness standards are objective, and thus different in character from determinations of

juror bias or competency to stand trial, which depend heavily on assessing the subjective state of mind of the juror or the defendant.[15]

Finally, it is traditional in our legal system to entrust "reasonable person" determinations in negligence cases to the trier of fact, subject only to deferential review. See Cooter & Gell, 496 U.S. at 402. As this Court explained in Thompson, however, the basis for that tradition lies in the entrustment of most negligence issues to juries, which are invited "to apply community standards" and whose decisions "cannot be reduced to anything approaching a definite rule." 116 S. Ct. at 466 n.13. Probable cause and reasonable suspicion determinations, however, are made by "[j]udges alone," and "they do so with a view to identifying recurrent patterns, and advancing uniform outcomes." Ibid. Moreover, the reasonableness of a search or seizure is not solely a function of community standards, but turns on a "balancing of competing interests" embodied in the Fourth Amendment. See Michigan v. Summers, 452 U.S. 692, 700 n.12 (1981). The task of "hold[ing] the balance true" is for the courts. Gates, 462 U.S. at 241.

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[15] The Thompson Court also observed that, "in fathoming the state of mind of a potential juror or a defendant in order to answer the questions, 'Is she free of bias?,' 'Is he competent to stand trial?,' the trial court makes an individual-specific decision, one unlikely to have precedential value." 116 S. Ct. at 466. Reasonable-suspicion and probable cause determinations, however, like the determination of custodial status at issue in Thompson, do have "law-clarifying benefits," and carry precedential weight. Id. at 466 n.14.

* * *

Applying a de novo standard to the ultimate legal questions whether reasonable suspicion and probable cause were present on the established facts of this case, we believe that both the stop and search were constitutionally valid and should be upheld. The court of appeals, however, stated that it reviewed the reasonable suspicion and probable cause determinations only for clear error. J.A. 65-66, 92. Because the questions whether, under a de novo standard, the officers' reasonable suspicion and probable cause determinations should be sustained were not presented in the petition for certiorari (nor do petitioners discuss or request that this Court decide those issues, see Br. 42), this Court should vacate the judgment below and remand the case to the court of appeals for application of the correct standard. Sup. Ct. Rule 24.1(a); see, e.g., Thompson, 116 S. Ct. at 467; Miller, 474 U.S. at 118.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded to the court of appeals for further proceedings.

Respectfully submitted.

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